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Supreme Court of the United States

OCTOBER TERM, 1904.

No. 69.

THE CHICAGO, INDIANAPOLIS AND LOUISVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

v.

PATRICK McGUIRE, M. M. HATHAWAY AND PHILLIP DELAHOOD, SHERIFF OF PULASKI COUNTY, INDIANA, DEFENDANTS IN ERROR.

In Error to the Appellate Court of the State of Indiana.

BRIEF OF DEFENDANTS IN ERROR.

M. WINFIELD,
W. H. H. MILLER,
Attorneys for Defendants in Error.

The Bollenbach Press, Indianapolis.

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But two questions are presented by the record in this case:

First. Was the federal question so presented in the

state courts of Indiana as to confer jurisdiction upon this court?

Second. Did the decree of foreclosure, in the Circuit Court of the United States for Indiana, embrace the property in controversy?

These two questions we will discuss in their order. We refer to the motion on file to dismiss, for want of jurisdiction, and the partial transcript and brief thereon.

I.

No federal question is referred to in any of the proceedings had in the White Circuit Court of Indiana. The record shows simply the empanneling of the jury, the hearing of the evidence, and the instructions by the court to render a verdict for defendants in error.

Printed Record, pp. 31-32.

The causes for a new trial on pages 33 and 34 of printed record are the ordinary statutory causes. First, error in directing a verdict for the defendant; second, error in striking out the second paragraph of amended complaint; third, error in ordering the plaintiff to make his second paragraph of complaint more specific; fourth, because the verdict is contrary to the evidence; fifth, because it is contrary to law; sixth, because the verdict is not supported by sufficient evidence; seventh, because the court erred in refusing to allow the plaintiff to read in evidence the town plat of the town of Francesville; eighth, ninth and tenth causes relate to the action of the court in permitting the defendants to read in evidence the papers and proceedings had in a suit against the Louisville, New Albany & Chicago Railway Company, by McGuire, wherein he recovered damages, and upon which judgment and execution were issued and the

property sold and bid in by the defendant, Hathaway; eleventh and twelfth causes relate to the testimony of Hathaway, as to the condition of the property, its use and occupation for twenty years before; thirteenth, it is assigned for error that the court refused to allow proof that the railroad had paid taxes to the town of Francesville, on the lands in controversy, for street improvements.

It will thus be seen that up to this time no intimation was made in the Circuit Court of Indiana that the plaintiff in error relied upon a federal question. The errors assigned in the Appellate Court of Indiana are (Transcript, p. 248):

1st. The sustaining of appellees' motion for a new trial as of right.

2d. The court erred in directing the jury to return a verdict in favor of appellees.

3d. The court erred in ordering the appellant to make its second paragraph of amended complaint more specific.

4th. The court erred in striking out the second paragraph of amended complaint.

5th. The court erred in overruling appellant's motion for a new trial.

The opinion rendered in this case by the Appellate Court of Indiana is reported in 31 Ind. App. 110.

Thus there is no intimation in the Appellate Court of Indiana, in the assignment of errors, that the plaintiff in error relied upon a federal question. Page 253 of the printed record shows the filing of the petition and briefs for rehearing and that the same were overruled. The first intimation that the plaintiff in error relied upon a federal question is found in the petition to the Appellate Court of Indiana, for a writ of error, after the petition for a rehearing had been overruled, which petition for a

writ of error commences on page 253 of the printed record.

The only case cited by plaintiff in error, which seems to support the plaintiff's contention, that this court has jurisdiction, is the case of *Pardee* v. *Aldridge*, 189 U. S., p. 429. This court held it had jurisdiction, without giving any reason. An examination of the record in that case discloses that both in the *nisi prius* court and in the Supreme Court of Texas the plaintiff in error gave notice that it relied upon a federal question and raised the federal question in the *nisi prius* court by a request to instruct the jury, and in the Supreme Court, by proper assignment of errors. The reason why, therefore, this court held jurisdiction is apparent. The record in this case is entirely silent upon any such question. Apparently the thought of raising a federal question never originated until the highest court of the state had decided the case, and plaintiff in error filed its petition in the Appellate Court of Indiana for a writ of error.

In *Howard* v. *Fleming*, 191 U. S., p. 137, this court said:

"It does not appear that the federal character of the question was presented to the Supreme Court of the state, although, in the opinion of the Supreme Court, the questions themselves were fully discussed. But in the absence of any claim to protection, under the federal constitution, we are compelled to hold that we have no jurisdiction in the case coming from the Supreme Court of the state, and the writ of error will be dismissed."

In *Beals* v. *Cone*, 188 U. S., p. 184, the rule, as insisted upon by us, is more forcibly stated. This was an action based upon an act of congress. This court says, on page 187:

"From the beginning of the trial to the end of the testimony there appears no single distinct claim based upon the constitution or statutes of the United States. No statute of the state of Colorado was questioned, nor was any title, right, privilege or immunity, under the constitution or laws of the United States, specially set up or claimed. In the instructions asked and refused, as well as in those given, there is only a general mention of the laws of the United States, and none of any particular statute. In the motion for a new trial, as well as in the assignments of error, in the Supreme Court of the state, there is not the slightest reference to the constitution, the laws of the United States, or any section or part thereof."

The rule in this court seems to be well settled. There must be, in the state courts, a distinct, special claim of protection under the constitution or laws of the United States. The plaintiff in error having failed to make any such claim, until, upon its petition for a writ of error to this court, no federal question is presented.

Supporting our contention we cite the following additional authorities:

Leigh v. *Green*, 193 U. S. 79;
Mallett v *North Carolina*, 181 U. S., page 589;
Gableman v. *Railroad Company*, 179 U. S. 335;
Defiance, etc., v. *Defiance*, 191 U. S. 184;
Home for Incurables v. *City of New York*, 187 U. S. 155;
Johnson v. *New York Life, etc.*, 187 U. S. 491;
Mutual Life v. *McGrew*, 188 U. S. 291.

This brief on this point is supplemental to the brief on motion to dismiss for want of jurisdiction.

II.

Should we be wrong on the first proposition, and should the court hold that the record in this case discloses that a federal question was specifically set up and claimed in the state courts, and such question is before this court for consideration, then we insist that the judgment of the state court should be affirmed on the merits.

The plaintiff in error filed in the state court an amended complaint in two paragraphs. (Printed Record, pp. 7-12.) The first paragraph is a statutory complaint, wherein plaintiff alleges that it is the owner, in fee simple, of this land, and that the defendants in error set up and assert some title, claim or interest in the described real estate, which constitutes a cloud upon its title, and it prays for a decree quieting its title. Under this paragraph, plaintiff in error, to succeed, must prove a legal title; that is, a chain of title, by deeds, in fee simple. Under the law of the state of Indiana, proof of an equitable title will not support the averments of such a complaint. Proof that the plaintiff in error had an easement would not support the complaint.

Rowe v. *Beckett*, 30 Ind. 154;
Groves v. *Marks*, 32 Ind. 319;
Hunt v. *Campbell*, 83 Ind. 48;
Stout v. *McPheeters*, 84 Ind. 585;
Caster v. *Jones*, 107 Ind. 283;
Johnson v. *Pontious*, 118 Ind. 270;
Town of Freedom v. *Norris*, 128 Ind. 377.

The second paragraph of the amended complaint is based upon an equitable claim to the property. But this paragraph is not in the record, although copied into the record. The defendants in error moved that the plaintiff

be required to make such second paragraph more specific, by showing or alleging what interest, if any, Allison, who made and recorded the plat, relied upon in such second paragraph, had in the land. (Printed record, p. 13.) The court sustained this motion; the plaintiff in error excepted, and says, "that it will not amend said second paragraph by making the same more specific, as ordered, but will abide its exceptions to the ruling of the court, and asks and obtains leave to file a special bill of exceptions number 1 within ten days from the date thereof." (Printed record, p. 13.) This, under the practice in Indiana, was an abandonment of the second paragraph of the complaint.

The matter embraced in pages 15 to 25 of the printed record is not properly in the record. It sets forth the proceedings had in the trial, and judgment, and motion for a new trial as of right, and a vacation of the judgment. By the Statutes of Indiana, in suits to quiet title and in ejectment, the defeated party on the first trial can have a new trial as of right at any time within a year. Of course, the judgment being set aside, the proceedings resulting in that judgment are annulled. (Burns' Revision of 1901, sections 1076 and 1083.)

The defendants in error filed a general denial to first paragraph of amended complaint. (P. 24.) So that the issue presented to the state court was, whether or not the plaintiff in error was the owner in fee simple; that is, had a legal title, by deed, to the lands in controversy.

Evidence.

The only evidence introduced by plaintiff in error to support its legal title was the decree of foreclosure in the case of *Charles E. Bill* v. *The Louisville, New Albany and Chicago Railroad Company et al.*, in the

United States Circuit Court for Indiana. (Printed record, p. 44.) Deed from Howland, special commissioner of the United States Circuit Court, to George F. Talman, issued upon a sale upon said decree. Articles of association of the Louisville, New Albany & Chicago Railroad Company. (Printed record, p. 47.) Articles of consolidation. (Printed record, pp. 50-51.) Mortgage Record of 1886, p. 56. Deed of trust from the Louisville, etc., R. R. Company to The Farmers' Loan and Trust Company, p. 57. Mortgage introduced, p. 71. Deed of trust and mortgage of the Louisville, New Albany & Chicago Railroad Company to the Central Trust Company of New York and John H. Stotsenburg, May 1, 1890, p. 71. Mortgage and deed of trust, same parties, to the Central Trust Company of New York and James Murdock, September 1, 1894, and decree of foreclosure, printed record, p. 116. Special master's report, p. 134. Master's deed, p. 139. Deed of Olcott, p. 144. Deed from Frederick P. Olcott to the Chicago, Indianapolis & Louisville Railway Company, p. 144. Articles of association of the Chicago, Indianapolis & Louisville Railway Company, p. 149.

On the 20th day of February, 1896, James C. Brooks, the only surviving heir at law of James C. Brooks and Mary C. Brooks, his wife, conveyed, by quit claim deed, this property in controversy, to the Louisville, New Albany & Chicago Railway Company. (Printed record, p. 155.) This deed, from Brooks, is the only evidence introduced showing a legal title to the land in controversy in the Louisville, New Albany & Chicago Railway Company. The defendant in error, Hathaway, claims title from the Louisville, New Albany & Chicago Railway Company, by execution against said company and under levy, sale and sheriff's deed. Thus the plaintiff in error and the defendant in error, Hathaway, claimed title from

the same common source. Where title is claimed through a common grantor it is sufficient to trace it to that source.

Wilson v. *Peelle*, 78 Ind. 382, 388;
Wright v. *Tichenor*, 104 Ind. 185, 187;
McWhorter v. *Heltzell*, 124 Ind. 129, 131.

The Brooks deed was dated the 20th day of February, 1896, after the execution of the last of the three mortgages. So the fact that it was property acquired by the Louisville, New Albany & Chicago Railway Company, after the execution of the three mortgages, is established by the evidence of the plaintiff in error.

On the west side of these three pieces of land described in the deed the Louisville, New Albany & Chicago Railway Company and its predecessors had maintained a track and side track and depot for many years before. Mr. Petrie testifies he went to Francesville in 1865. There was a depot building on the west side of this ground described in the deed at that time; had the appearance of being old—ten or twelve years old; there was a railroad track running on the west side north and south; been there ever since. The depot has been there ever since. There were stock pens there. (Printed record, p. 174.)

Except by this deed from Brooks, the only title which the plaintiff in error and its grantors had, as shown by the evidence, was the construction and operation of the railroad, with a depot on the west side of the property described in the deed, which gave the railroad company an easement in the ground thus occupied and used, and no more. It is well settled by the decisions of Indiana that evidence is admissible to show the intention of the railroad company in appropriating the property for railroad purposes, and that the extent of the

user, by the company, as shown by the evidence, is a limit of the rights acquired by the railroad company for railroad purposes. In a word, where a railroad company claims title by use and occupation, so far as it has used and occupied the property, it has rights, but no farther; and the title thus acquired is an easement simply and not a fee.

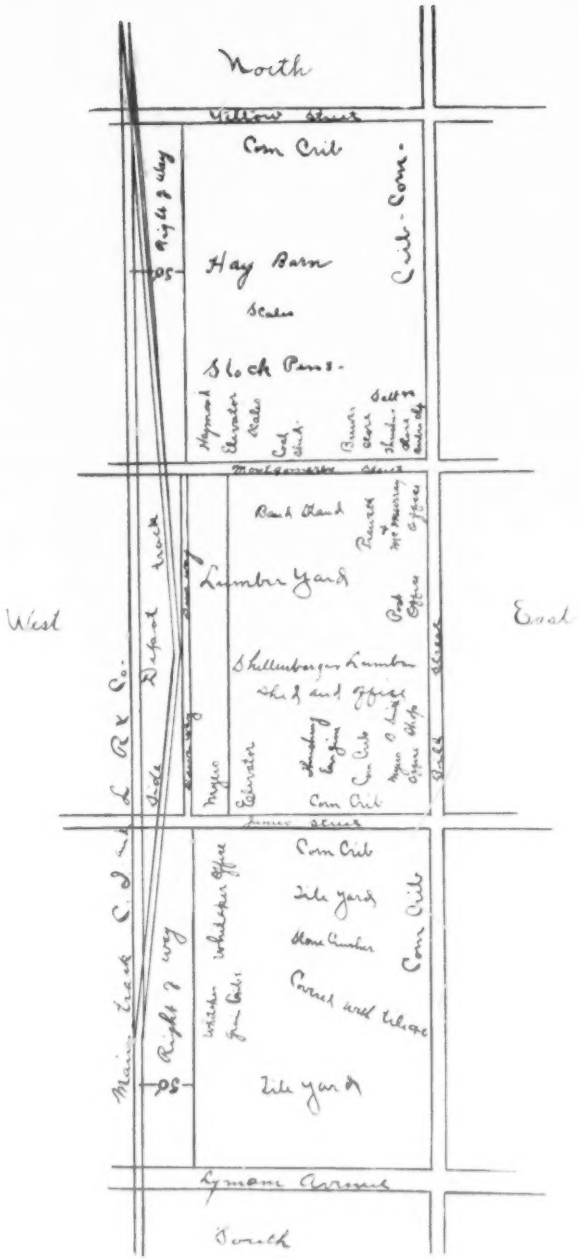
Indianapolis & Vincennes R. R. Co. v. *Reynolds,* 116 Ind. 356;

Ft. Wayne, etc., R. R. Co. v. *Sherry,* 126 Ind. 334;

Indianapolis & Vincennes R. R. v. *Lewis,* 119 Ind. 218;

Lake Erie & Western v. *Michener,* 117 Ind. 465.

The deed from Brooks covers the ground thus occupied by the railroad and used, and also the ground in controversy, which lies east of the railroad's right of way and east of the depot; so that the plaintiff in error showed by this deed of 1896, from Brooks, a legal title in the property in controversy. Both parties claim title from the same common source, to wit: James C. Brooks and wife. At the time of the execution of these several mortgages there was no legal title in the mortgagor to any part of it, simply an easement along the west side of the three tracts of land. The situation of the premises, as described by witness Hathaway, at the time of the execution of the mortgages, and of the deed from Brooks, is best presented by the following plat:


North
Willow Street
Corn Crib
Hay Barn
Scales
Stock Pens.
Crib - Corn -
Hydraulic Elevator Rake
Cob Shed
Boilers
Shafting
Belting
Montgomery Street
Lumber Yard
Rail Road
Planers
Post Office
West
East
Shellenberger Lumber Shed and Office
Engine
Corn Crib
Elevator
Shafting
Engine & Boiler
Office
Shed
Lumber Street
Corn Crib
Coal yard
Stone Lumber
Corn Crib
Corn Crib
Coal yard
Symone Avenue
Bench

McGuire obtained a judgment against the Louisville, New Albany & Chicago Railway Company for damages, for failure to furnish cars to ship hay, in the White Circuit Court, for $2,416.33, September 23, 1896. (See printed record, p. 194.) On the 16th of October, 1897, an execution was issued upon this judgment by the clerk of the Cass Circuit Court to the sheriff of Pulaski county. A levy was made by the sheriff upon the property in controversy, it being all that part lying east of the right of way of the depot grounds of the railroad. It was sold at public sale on the 13th of November, 1897, and bid in by the defendant in error, M. M. Hathaway, for the sum of $2,000, and he received the certificate of purchase. (See printed record, pp. 195-201.) The property was appraised in three separate tracts. (Printed record, pp. 202-203-204.) Being unredeemed, a sheriff's deed was executed to the defendant in error, M. M. Hathaway, on the 22d day of November, 1898. (Printed record, p. 205.) This levy was upon the three lots lying east of the right of way and the depot, which was levied upon as the property of the Louisville, New Albany & Chicago Railway Company, as property acquired by said company, under said deed from Brooks, after the execution of said mortgages. This property, in controversy, was not acquired for railroad purposes, and was not used for railroad purposes, but, on the contrary, it was leased by the railroad company to other parties, upon which had been constructed buildings used for groceries, scales, storing of grain, elevators, post-office, blacksmith shop, corn cribs and barber shops. These facts are not disputed.

M. M. Hathaway, a witness called by the defendant in error, fully describes the property and its condition for twenty years prior thereto. On p. 240 of the printed record, at the close of the testimony, we have the following admission, made by plaintiff in error:

"By Judge Field: The plaintiff will not dispute this state of facts on this question by witnesses, and will not put any witness on the stand on this question, because Mr. Hathaway has stated these locations, and we will dismiss our witnesses on that question."

Page 241 of the printed record, E. H. Applegate, a witness, was called on behalf of the defendants in error. He was asked this question: "Are you acquainted with this ground that was levied upon by the sheriff on an execution against the Monon road?"

Answer. "Yes, sir, I think I know the parts that they levied on; I helped measure the ground."

Q. "During the whole time you have lived at Francesville (he having stated that he had lived there for twenty years), have you ever known any part of this ground to be used by the railroad?"

Plaintiff objected to the question, because it goes back to twenty years, and that is the time that Mr. Hathaway answered in respect to; the plaintiff will not put a witness on the stand on the subject.

By Judge Winfield: "You will not attempt to dispute the fact?"

By Mr. Kretzinger: "We will put no witness on the stand on the subject." So that the testimony of Mr. Hathaway stands uncontradicted. His testimony commences on p. 225 of the printed record.

"He had been acquainted with this ground for eighteen or twenty years; no part of this ground levied upon has ever been used for railroad purposes. It is used by parties for storing corn and grain, by business men, general merchandise business, such as restaurants, groceries and mercantile business; by men with offices for lumber yards. It has a building containing the postoffice, and has had for a number of years; one or two elevators, and used for general purposes, you might say, by the cit-

izens; blacksmith shop on it and lumber yard, and corn crib; also a barber shop; the buildings are frame. The property is situated in the center of the town; the principal street is Bill street; this ground is immediately east of the right of way, west of Bill street, in the town of Francesville, and between Yellow street on the north, running east and west, and Montgomery street, the first street south, running east and west, and between Montgomery, running east and west, and James street, the second lot, and the third lot is between James street and Lyman avenue. The stock pens were not embraced in the levy; no part that is used or ever has been used by the railroad company was levied upon. The depot is on the right of way, on the east fifty feet of the right of way, in the center lot. The right of way is fenced on the north, indicating the line of the right of way. The land levied on is all on the east side of the track, fifty feet from the center of the main track. Francesville has a population of 800 people; these grounds levied upon were leased by the railroad company to people, citizens there, for general business; they stated to me that they were holding the possession of the ground by lease of the Chicago, Indianapolis and Louisville Railway Company; I saw their lease. On the north lot is a hay barn that is now in possession of Prewett & McMurray; there are three corn cribs filled with corn that are used by Prewett & McMurray, but the stock pen was not included in the levy. There is a hog pen on this north lot and a pair of weighing scales for hay and large loads, and that is in the possession of John Coster. The stock pens have been there for twenty years. West of the fence, along the right of way, is the main track and the railroad side track; that fence is fifty feet east of the center of the track; on this north lot is Haymond's grain elevator and scales; they were there when the levy

was made, also a salt bin and store house for salt, and those things connected with a grocery store not ordinarily kept in the store, to be used by Mr. Brewer; then comes the Brewer store, and on the corner is a building occupied by Wood Thrasher, in which he has a barber shop and ice cream parlor and a restaurant. Montgomery street, south of the north lot, is an improved street; the street has been there ever since I knew the town. These buildings I speak of front south on Montgomery street. The middle lot levied on is south of Montgomery street and extends from Bill street west 120 feet, and upon this we first have an office, a grain office, that is used by Prewett & McMurray; west of this grain office is a band stand, which has recently been torn down; there are sheds and lumber up to a little road between this point and the part levied upon; this office fronts on Bill street; next to Prewett's office is the postoffice; the postoffice faces east; next to the postoffice is an office used by Shellenbarger for a lumber office; next to his office is a lumber shed, occupied and used by him for storing his better grade of lumber; the lumber shed and the lumber extends back, covers the part levied upon, all of it; probably been there five years; he said he had leased this property from the railroad company; south of Shellenbarger's lumber yard is a blacksmith's shop; it has been there three or five years, occupied by one Nelson, who is carrying on the business. The balance of that middle lot is occupied by Joseph Myers & Son for an elevator and a private office, and south of their office is a couple of corn cribs, quite lengthy corn cribs, filled with corn, and then immediately back of the corn cribs is an elevator, in the southwest corner of this tract that was levied upon; a grain elevator, used by Myers & Son in their business; they said they were there under a lease from the railroad company. In addition to this,

and scattered over the south end of the middle lot, in the space that is not covered by buildings, there are some old threshing machines and engines, not railroad engines, but threshing machine engines. All the middle lot, at the time of the levy, and up to the present time, was occupied and used for private purposes; no part of that middle lot has been used by the railroad for railroad purposes; it has been used just as I have described it here; there is a driveway between this property levied on and the side track to the depot that is used for loading and unloading and hauling lumber, but that driveway is west and outside of the ground that was levied upon. The depot is reached from either end, but not over the ground levied upon. James street is a traveled street; west of the grain elevator is the right of way of the railroad company, a grain elevator and side track; no part of the layout of the road is on this middle lot; south of James street, the third lot—on this is an office occupied by Whittaker; south of that is Whittaker's bins or cribs for storing corn and a corn sheller, and an outfit of that kind; the northeast corner is a large corn crib that is owned and used and occupied by this man Whittaker; at the time it was levied upon it was dotted over pretty much by tile; the tile is scattered promiscuously over the lot; there is now a stone crusher outfit standing there; I don't know who that belongs to; south of the south lot is Lyman avenue, a traveled street; on the right of way of the railroad, west of the grain elevator levied upon, besides the depot and the cattle pens, the railroad has a tool or car house, which is on the right of way; none of it is on this ground; this railroad runs from Michigan City to Monon."

When the Louisville, New Albany & Chicago Railroad Company purchased this property, in 1896, this was its condition, and afterwards it leased these buildings, scat-

tered over this property, to various parties. No part of it had ever been used for railroad purposes, and there was no intimation that any part of it would be used for railroad property. It was not purchased nor used for railroad purposes.

The question at issue is, whether or not the decree of the United States Circuit Court, based upon these three mortgages, embraced this particular property levied upon?

Meaning of Mortgages.

The Appellate Court of the State of Indiana, in its opinion, has correctly stated the provisions in the three mortgages with reference to after-acquired property. The opinion is on page 250 of the printed record. We quote from the opinion:

"In the mortgage of 1886 the description of after-acquired property is as follows: 'Which may at any time hereafter, during the continuance of this trust, be acquired by the said railroad company for purposes connected with, or appertaining to the railroad or railways, above mentioned or described.'

"The description of the after-acquired property, in the mortgage executed in 1890, was in the following words: 'And all that it may in the future add, construct or acquire, for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described.'

"The description of the after-acquired property in the mortgage executed in 1894 was in the following words: 'What may at any time, before or after the date of this indenture, be acquired by or for the said railway company, for purposes connected with, or appertaining to said railroads, or railways, hereby conveyed.'"

In the Appellate Court of Indiana it was admitted in the original briefs on both sides that the above quotations correctly stated the provisions of the mortgages in reference to after-acquired property.

It is now claimed that the mortgage of 1890 contains other provisions broad enough to embrace land not acquired for railroad purposes. In this we think counsel for plaintiff in error are mistaken. The mortgage of 1890, page 71 of the printed record, contains the following provisions in the granting clause:

"And also all other railroads, extensions and branch lines which the railway company, party of the first part, may, at any time hereafter create, own or acquire, whether by construction, purchase, consolidation or otherwise, whether within the state of Indiana or in any other state, including and conveying by these presents all the property of every sort or nature, real, personal and mixed, now owned by said railway company, and all that it may in the future *add, construct or acquire,* for the purpose of and connected with or appertaining to the railroads or railways above mentioned and described, whether now owned or hereafter to be constructed or acquired," etc.

Again:

"It being the true intent and meaning of these presents and that the said railway company, party of the first part, shall and doth convey to the said trustees all and all manner of franchises of every kind and description, however derived and wherever situate; all and all manner of real estate and interest therein, wherever such real estate may be situate, and all and all manner of personal property of whatever nature or description, the same may be, at the date of these presents owned or possessed by the said railway company, or which may, at any time hereafter, during the continuance of this trust, be acquired by the said railway company, for purposes connected with or appertaining to the railroads or railways above mentioned or described, or intended to

be hereby conveyed, whether now in existence or at any time hereafter to be constructed or acquired, whether within or without the state of Indiana, and also all choses in action, of every kind and description, including bills receivable, book accounts, traffic balances, all books of record and all accounts of every kind and description, all papers, maps, inventories and documents in any wise referring or relating to the property or franchise hereby conveyed; and also all franchises and property and all personal rights or interest in any franchise or property, of every kind and description, real, personal or mixed, and wherever the same may be situate, that may at any time, before or after the date of this indenture, be acquired by or for the said railway company, for purposes connected with or appertaining to said railroads or railways, either now owned or hereafter to be acquired, all of which it is hereby covenanted shall inure, by way of accretion, to the benefit and advantage of said trustees, by way of further and better security for the bonds to be issued hereunder."

Thus, in one clause it is stated that after-acquired property is property acquired for railroad purposes, and then it is declared to be the intention of this instrument that it shall embrace all after-acquired property obtained for railroad purposes. Then follows the clause upon which counsel for plaintiff in error are now basing their contention:

"It being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, choses in action, contract rights and franchises which the said railway company now owns or at any time hereafter may own, as fully and to the same extent as if all such property were now in existence and owned by the said railroad company, and were specifically described herein and conveyed hereby."

Counsel for plaintiff in error conceded in the Appel-

late Court of Indiana that the first clause governed, but having discovered that their position is untenable, and that their client can not hold this property under that clause in the mortgage, they now ask to eliminate the first and second clause herein quoted and consider solely the last clause.

We have set out the granting clause, and the one relied upon by plaintiff in error might be denominated the *habendum et tenendum*. It is formal and not intended to embrace property not covered by the granting clause.

The clause, "It being intended and hereby expressly covenanted," etc., stands, with relation to the preceding clauses, as if it were found in the habendum clause, and it seems to be well settled law that the subject-matter of a grant can not be enlarged by such a clause.

Thus, in Washburn on Real Property, 4th edition, 3d volume, on page 438, it is said:

"The habendum may enlarge, expound, qualify or vary the estate granted in the premises, but it can never extend the subject-matter of the grant."

In *Manning* v. *Smith*, 6 Conn. 289, the habendum clause read: "To have and to hold the premises with all their appurtenances unto the said," etc. It was held by the Supreme Court of Connecticut that the appurtenances did not pass, it being said:

"The subject-matter of the grant in the deed is the land, but that does not include the easement, as we have seen. Can, then, the thing granted be enlarged by the words 'to have and to hold with the appurtenances?' It is in the premises of the deed that the thing is really granted." (Citing numerous authorities.) "It is the office of the habendum sometimes to enlarge the estate granted, but never to extend the subject-matter of the grant, as was correctly laid down by the counsel for the defendant."

Clearly the last clause in the mortgage of 1890 was intended to serve the purposes of a habendum clause, namely, to explain and make clear what had gone before. The granting clause of the mortgage had already declared that the mortgage should cover all after-acquired real estate acquired for railroad purposes; and when, in the later clause it is said, "It being intended and hereby expressly covenanted that the lien of this indenture shall embrace and bind all railroads, real and personal property, which the said railway company now owns or at any time hereafter may own," it is clearly understood to mean any real estate which the company may hereafter own for railroad purposes.

A specific description always controls a general. This is axiomatic in the construction of deeds. The first clause specifically mentions the real estate intended to be mortgaged; that is, the real estate the company now owns and all that it might thereafter acquire for railroad purposes. And in the second clause this is declared to be the intention of the mortgage, and it is ridiculous to suppose that these two clauses are rendered meaningless by the after clause quoted. It can not be presumed it was in the mind of the mortgagee and mortgagor that the mortgagor would acquire any real estate except for railroad purposes. It can not be presumed that the mortgagee anticipated that the company would go into the real estate business and buy lands for speculative purposes, and lease the same to private parties for general business. They must have had in mind the charter rights of the company in the acquisition of real estate. Under the laws of Indiana the company could only acquire real estate for purposes connected with its road.

Statutory Policy.

Section 5150, Burns' Revision of 1901, which has been the law ever since 1852, authorizes the railroad company to receive, by purchase or subscription of stock, lands, and to hold and convey the same, that may be necessary for the purpose of erecting depots, turnouts, workshops, warehouses, or for any other purpose necessary for the convenience of said company, in order to transact the business usual for railroad companies.

Section 5151 provides, that by order of the board of directors, the company may receive lands, in payment of subscriptions of stock, but said section contains the following proviso: "That the same shall be sold (except so much as may be necessary for the use of said roads or for the purpose aforesaid) within a reasonable time, and the proceeds applied for the construction of said roads or their appurtenances," the clear intention of the legislature being, that while a company may receive lands as subscription for capital stock, the same must be sold within a reasonable time and the proceeds thereof used in the construction of the road. It is not intended that the railroad shall go into the real estate business. Such a course would be against the policy of the state—otherwise a railroad with enormous capital might buy up large tracts of land and hold them indefinitely.

Section 5152 provides that it shall file a map and profile, showing what land it needs for its road.

The second clause of section 5153 provides that the railroad may receive, hold and take such voluntary grants and donations of real estate and other personal property as shall be made to it, to aid in the construction, maintenance and accommodation of such railroads, but the real estate thus received by voluntary grants

shall be held and used for the purposes of such grants only.

Here we find another express limitation upon the powers of the company. Clause 3 of the same section provides that it may enter upon and take possession of such lands only as may be necessary for its road.

Clause 7 provides that where it changes the route of its road it may take lands necessary for the new route. Thus it is manifest that the policy of the state of Indiana, as declared by the legislature, is against a railroad corporation purchasing or acquiring lands for any other purpose than to aid in the construction of its roads, and for its maintenance and operation. Therefore, when this mortgage of 1890 was executed it was understood to embrace such after-acquired property as the company might lawfully acquire for the purpose of aiding in the construction of the road, and to maintain and operate it, and none other. That this was so understood is manifest from the mortgage itself. The clause, "and all that it may in the future add, construct or acquire for the purposes of and connected with or appertaining to the railroads or railways above mentioned and described," is a restrictive clause showing that the parties to the mortgage had in mind such lands as the company might thereafter acquire lawfully under the statutes of the state. This was so understood by appellants' learned counsel upon the original hearing in the state courts before they received a new revelation.

We quote from their original brief in the State Court:

"The primary and general test is, if the company was authorized to appropriate the land for railroad purposes, then it will be held as embraced within the usual covenants of the mortgage respecting after-acquired property."

We accept this test as a fair construction of the laws of the state of Indiana in the Appellate Court. The Appellate Court of Indiana has applied the test, and has held that where real estate is acquired after the execution of a mortgage, for other than railroad purposes, the mortgage will not attach.

The section of the statute quoted by counsel, section 5212 of the Revised Statutes of 1901, so far as it refers to after-acquired property, must be construed to mean such after-acquired property as the company might, under the laws of Indiana, acquire, by condemnation, for the construction, maintenance and operation of its road. The general authority to mortgage present and future-acquired property must be construed in the light of the charter rights of a company. It would be absurd to say that in the granting of authority to railroad corporations, specifying what powers they may possess, there is a limitation as to the kind of property they may acquire, and how they may hold it, but in a general statute providing for the mortgage of a railroad authority is given to acquire real estate indefinitely and for any purpose, with authority to mortgage the same.

We concede, if the railroad does acquire property not needed for railroad purposes, no one can question its right to hold it except the state, but what we are saying is, this property, as between McGuire, the judgment creditor, and the mortgagee, under the mortgages of 1886, 1890 and 1894, McGuire has a right to say, this is the property of the old company; it did not pass to the new company under the mortgages.

Another test might be applied. If this company had acquired this property by deed, and it was used in the manner described in the testimony of Hathaway, and the state had instituted *quo warranto* proceedings to know by what authority the railroad company was holding the

property and leasing the same to the parties, in the manner described in the testimony of Hathaway, there can be no question but that such action would result in dispossessing the company of its title. (*The Bank of Vincennes* v. *The State*, 1 Blackford, p. 267.) But that it did not pass under the mortgages, and decree of foreclosure, to the plaintiff in error, is well settled by an unbroken line of decisions.

Decisions.

Seymore v. *Canandaigua, etc., R. R. Co.*, 25 Barb. 284, is a case in point. It was a suit between a creditor and a purchaser under the mortgage. The railroad mortgage contained the following clause: "Grant, convey, transfer and set over the said railroad constructed and to be constructed, together with all and singular the railways, rails, bridges, fences, privileges, rights and real estate now owned by said company, or which shall hereafter be owned by them." (Page 288.)

The court, on page 307, referring to the above clause in the mortgage relating to future-acquired property, says:

"The description in the mortgage of the land acquired and to be acquired must be deemed to refer to the charter, and the law defines the land which the mortgage is designed to cover, and the lien of the mortgage clearly attached to such unacquired land so soon as the title thereto passed to the corporation."

It was, therefore, held, that although the mortgage in terms was intended to cover all future-acquired real estate, it must be limited to such real estate as it had a right to acquire under the law for railroad purposes;

that is, by condemnation. But in the mortgages in question it is specified that the future-acquired property is such property as the railroad might acquire for railroad purposes.

On page 312 the court quotes the charter of the company. It is identical with the railroad law of the state of Indiana, and says:

"Under this provision the company was authorized to purchase and hold such lands as were necessary for depots, stations, warehouses, wood-yards, shops and other legitimate purposes. All such lands, with the erections thereon, would pass to the complainants, under their mortgage, as part of the railroad, or as essential to its use and enjoyment. But lands acquired by the railroad company, and not thus used or employed for railroad purposes, would not come within the description of the mortgage."

Again it says:

"It is in proof that some of the lands purchased in Batavia have never been used for railroad purposes. That in some instances whole lots were purchased to secure a right of way across them. If the railroad company, for this purpose, had purchased a lot of ten or one hundred acres, it can not be that any more of such lots would be embraced in this mortgage to the plaintiffs than was actually taken and required for the road. In respect to all such lands outside of the legal limits of their railroad track and branches, and excepting land used for shops, depots, stations, turnouts for wood or water, or other legitimate purposes, the lien of the defendants' judgment must prevail."

The conclusion of the court was that all lands acquired subsequent to the mortgage, not used for railroad purposes, were not embraced in the mortgage.

Shamokin Valley R. R. Co. v. *Livermore*, 47 Penn.

State 465, is squarely in point. The real estate in controversy was adjacent to the right of way of the company. The court holds, they were not appurtenant, in the legal sense, to the railroad, by any grant, deed, writing or act in the law capable of so doing; and holds that land can not, of itself, be appurtenant to other land, except by incorporation, and then the operation is by union of identity and not by servitude. The court says:

"Before these lots could become incorporated with the ordinary franchise of the company it needed some definite, clear and well defined acts of the company to produce the incorporation."

Like the company in this case, it was holding these lots for profit and leasing them, and the court adds, upon this branch of the case:

"Now the Danville & Pottsville Railroad Company holds these lots by deed, independently of their railroad franchise, and as they had the power of drawing profits and of selling as a natural person might, it follows that, *prima facie*, there was a right to levy the property in executions, and sell it for the debts of the company, and a good title would pass unless the fact of incorporation with the franchise, and a consequent subordination thereto, could be shown to have preceded the levy and sale. The case was, therefore, clearly one which turned upon this question of fact."

So we say here, these lands, under the testimony of Hathaway, had never been incorporated with the franchise of the railroad company, and as found by the Appellate Court of Indiana, they had been held and used ever since the company acquired title for other and different purposes than railroad purposes, and the railroad company was deriving a profit therefrom by the leasing of the same. The court in this case adds:

"What was the effect of the sheriff's sale on the company's title? They had very express authority, by the incorporating law, to buy, hold, mortgage and sell lands; in locating their road they probably found it expedient to buy the Lukens farm rather than pay damages for crossing it. This is often the true policy of railroad companies. But lands so bought and not actually dedicated to corporate purposes are bound by the lien of judgments, and are liable to be levied in execution, and sold by the sheriff, in the same manner and with the same effect as the lands of any other debtor."

The same doctrine is announced in *No. Pac. R. R. Co.* v. *Parker*, 143 U. S. 42. We quote simply from the syllabus:

"A mortgage by a railroad company of its railroad, rights of way, roadbed and all its real estate then owned or which might be thereafter acquired appurtenant to or necessary for the operation of the railroad, and all other property wherever situated in the state, then owned or which might thereafter be acquired by the company, and which should be appurtenant to or necessary or used for the operation of its road, and also the tenements, hereditaments and appurtenances thereunto belonging, does not cover a grant of lands within the state subsequently made by congress to the company in aid of the construction of its road."

The lower court so held, on the theory that it was not contemplated at the time the mortgage was executed, that the railroad company would acquire land except for railroad purposes.

See *Boston & N. Y. Air Line Co.* v. *Coffin*, 50 Conn. 150;
Mississippi Valley Co. v. *C., St. L. & N. O. R. R.*, 58 Miss. 846;
Eldridge v. *Smith*, 34 Vermont 484;
Pardee v. *Aldridge*, 189 U. S. 429.

The authority of a company to bind its future acquisitions, by mortgage, is limited to such property as it has the power, by law, to acquire.

Jones on Mortgages, sections 155 and 157;
Meyer v. *Johnston*, 53 Alabama 237 and 331;
State v. *Glenn*, 18 Nevada 34;
Mississippi R. R. Co. v. *Chicago R. R.*, 58 Miss. 896;
Maxwell v. *Wilmington, etc., R. R. Co.*, 77 Fed. 938;
Morgan v. *Donovan*, 58 Ala. 241.

In order that the mortgage should cover after-acquired real estate it must be necessary to preserve the road intact. This is on the ground of public policy.

Cook on Corporations, 5th ed., 857.

The Appellate Court of Indiana correctly interpreted the three mortgages, and its decision declares the law strictly in accordance, not only with the current decisions of the courts of other states, but with the decisions of this court.

Pardee v. *Aldridge*, 189 U. S. 429.

It never entered the mind of the attorneys for plaintiff in error, when they obtained a decree foreclosing the three mortgages in the United States Court, that the mortgage of 1890 embraced property not embraced in the mortgage of 1886 and 1894.

The decree is an entirety and covers only such property as is covered by the mortgage of 1886 and 1894. If they were claiming greater rights under the mortgage of 1890, such rights or claim would have been set forth in the decree, but having failed to claim any greater rights under the mortgage of 1890 than they had under

the mortgage of 1886 and 1894, at the time of the foreclosure proceedings, they must be deemed and held to have waived any such additional claim or right.

III.

The Interpretation of the Decree.

If this court holds that it has jurisdiction, on the ground that the Appellate Court of Indiana interpreted the decree in the United States Court, then we insist that there can be no interpretation of this decree which would give this land to the plaintiff in error. We contended, in the Appellate Court of Indiana, that after-acquired property, to pass under a decree upon a mortgage, must be described in the decree; that the bill must describe the property acquired subsequently to the execution of the mortgage, so that the decree may set it out. Under the laws of Indiana, and as held by this court, a decree for the sale of lands, to be effective, must so describe the lands that the same may be found by the sheriff, or other officer executing the process of the court, by reference to the decree itself, without the aid of extraneous evidence. The Appellate Court did not deem it necessary to pass upon this question, for the reason that, as the mortgage only attached to real estate, subsequently acquired for railroad purposes, and as this land was purchased and held, not for railroad purposes, the lien of the mortgage did not attach.

But should we be in error upon the question of jurisdiction and the true interpretation of the mortgage, and should this court hold that property like this might pass and was covered by the mortgage, then this court must interpret this decree.

We insist that the undisputed evidence is, that this

land was not a part of the layout of the road, and not being a part of the layout of the road, before it could pass by judicial sale the decree must specifically describe it so that the land might be identified and the court might put the purchaser in possession, from the description of the decree itself, without reference to extraneous evidence.

In the leading case in Indiana, *Bowen* v. *Wickersham,* 124 Ind. 404, it was held, in an action to recover title passed upon judicial sale, that "it must appear from the decree and deed through which he claims, without the aid of extraneous evidence, that the title to lot No. 9 is in him. * * * A description in a deed or mortgage may be sufficient even though it may be necessary on account of its imperfect or indefinite character to aid the intention of the parties by averring and proving extraneous facts. This rule has, however, no application to a description found in a decree of foreclosure or in a conveyance made in pursuance thereof. Descriptions of land found in judicial decrees or sheriff's deeds can not be reformed or aided by invoking the chancery powers of the court. *Lewis* v. *Owen,* 64 Ind. 446; *Dale* v. *Travelers Ins. Co.,* 89 Ind. 473."

"Where the description as contained in a mortgage, or other instrument, is imperfect or indefinite, the land actually mortgaged or conveyed should be accurately described in the bill or complaint to foreclose, and the description in the decree should be so reformed that the officer may know on what land to execute the order of the court. *Struble* v. *Neighbert,* 41 Ind. 344; Jones Mort., section 1862. The sheriff must be able to identify the property from the description contained in the decree, and the purchaser can only be put in possession of the land definitely described in the deed. *Cunningham* v. *McCollum,* 98 Ind. 38; *Runnells* v. *Kaylor,* 95 Ind. 503."

"If the decree and deed are so defective that it can not be ascertained by inspection, or from data which they furnish, what property was, in fact, sold, or if, in order to ascertain the intention of the officer in selling, it becomes necessary to institute an extraneous inquiry, the deed is void for uncertainty. Freeman Ex., section 281."

Short's Law of Railway Bonds and Mortgages, section 204, says:

"It has been said that there is not the same necessity for a particular description in railroad mortgages as in mortgages by private persons. But this statement seems to be incorrect. *Mutatis mutandis,* the requisites of a valid mortgage of after-acquired property are the same whether the mortgagor is a railroad company or an individual."

All that passed under this generic description contained in the decree was what is known as the railroad, which includes its right of way, railroad bed, side tracks, depots and stations; that is, *the property actually used in the maintenance and operation of the road.*

The same author, in the same section, says:

"If the property has no immediate connection with the operation of the road, a merely generic description will not fasten a lien upon it. The language used must, in this case, be sufficiently specific to designate the property, without reference to extraneous circumstances. This distinction is fundamental, and pervades all the cases which turn upon the sufficiency of the description."

If it is intended to sell, under the decree, after-acquired property, it should be set up in the bill, otherwise it will not pass under the decree. Jones on Mortgages, section 1581; *Kreichbaum* v. *Melton,* 49 California 50; Jones on Mortgages, section 1462; *Triplett* v. *Sayre,* 3 Dana 590; *Struble* v. *Neighbert,* 41 Ind. 344; *Magee* v.

Sanderson, 10 Ind. 261; *Whittelsey* v. *Beall*, 5 Blackford 143; *Davis* v. *Cox*, 6 Ind. 481; *Cecil* v. *Dynes*, 2 Ind. 266; *Nolto* v. *Libbert*, 34 Ind. 163; *White* v. *Wyatt*, 40 Ind. 385.

This court, in *Gray* v. *Brignardello*, 1 Wallace 627, in speaking of the defective description in the decree, says:

"Purchasers at a judicial sale are protected, when the power to make the sale is expressly given, not otherwise. It is only when they buy on the faith of an order of the court, which clearly authorizes the act to be done, that the shield of the law is thrown around them. An officer of the court may erroneously suppose that the power to sell is given by a decree, yet, if he does sell, his act is without authority of law, and is void."

To have authorized the sale of this land, it not being a part of the layout of the road, and the property being occupied by persons engaged in general business, the bill or complaint should have described it, setting forth that it was after-acquired property and asking for an order that it be sold. Then the court might possibly have been authorized to have entered a decree against this property, and, if described in the decree, the decree would have authorized the sale. Unfortunately, whether for plaintiff in error or for us, the plaintiff in error did not introduce the original bill, upon which the foreclosure was had. Had the decree described this property the court might have presumed that the bill contained a description of the property, but as the decree does not describe the property, it must be presumed that the description in the decree follows the averments in the complaint. Now, how could the United States Court put the purchaser in possession of this property? If the officer had gone to Francesville he would not have found the rail-

road company in possession of this property, but would have found it covered with buildings and business houses occupied by private citizens, engaged in general business. The decree would furnish no aid whatever.

It would be useless to prolong this argument and cite additional authorities. Under no interpretation of the decree of the United States Court can it be found that this land, held and occupied, as described, ever came within the jurisdiction of the United States Circuit Court. No question as to the title of this land was presented to the United States Circuit Court. It is an axiom of the law that only such questions are decided by courts as are within the issues. By no inference from the record introduced from the United States Circuit Court can it be said that the ownership of this property was in issue. Therefore, this decree could not act upon this property. It does not pretend to. The title of plaintiff in error is under this decree, and it takes title only to such property as was authorized to be sold under the decree.

IV.

Errors Relied Upon in the State Court.

We submit, in confidence, that the rulings of the Circuit Court of Indiana, on the admission and rejection of evidence, do not present any federal question. The legal question, whether the alleged plat of the town of Francesville was competent or incompetent evidence in that court, is not a federal question. The evidence offered, of assessments paid for street improvements by plaintiff in error, and rejected by the Circuit Court of the state, presents no federal question.

The State Court was clearly right, under the laws of Indiana, in excluding the evidence. Relying, in its complaint, upon a fee simple title, evidence tending to show that it had some sort of an equitable title was incompetent. Had the plaintiff in error set out in the complaint his source of title to this property, and the Circuit Court of the United States had held that the title was good, and that the property was covered by the mortgage, a different question would have been presented. It does not appear that Allison ever owned the lands. (See purported plat.) Said plat was invalid for the following reasons:

1st. No grantee was named capable of taking the grant. There is nothing on the plat to show that these grounds in controversy were dedicated at all.

County Commissioners of Hennepin Co. v. *Dayton*, 17 Minn. 260.

2d. There can be no dedication for railroad purposes at common law.

Todd v. *Pittsburgh R. R. Co.*, 19 Ohio St. 514;
R. R. v. *Whitham*, 155 Ill. 514;
Commissioners v. *Dayton*, 17 Minn. 260.

3d. The plat must be by the owner.

Elliott on Roads and Streets, page 105;
City of Lawrenceburgh v. *Wesler*, 10 Ind. App. 153.

4th. The land dedicated must be described with sufficient particularity to enable a surveyor to find it from the data. The dedication can only be proved by the plat itself.

Elliott on Railroads, section 947.

There was no description of any land. The legalizing act of 1895, section 4238a, was intended simply and solely to legalize plats of towns and cities which had been recognized and lots sold, streets made and improved, in reference thereto, and had been acted upon for a number of years. For instance, if lot 4 of Jones' Addition to the City of Indianapolis was sold by that description, by a chain of title, but the plat had never been properly executed, the purpose of the act was to legalize such plat, so as to perfect the chain of title. But such act was never passed for any such purpose as contended for by counsel. They offer no evidence that a single lot had ever been sold by this plat or that a single lot described in this plat had ever been taxed. On the contrary, the only evidence offered by the appellant was that three lots had been assessed to the railroad, without any reference to any plat whatever.

If we concede, for the purpose of the argument, that the Circuit Court of Indiana erred in rejecting the plat as evidence, how can that aid the plaintiff in error in this court? No federal question was involved, and it would only tend to show that the railroad company had acquired, by this litigation, an easement in the property, and proof of such easement would not support the averments of the amended complaint.

ERRORS COMMITTED IN THE STATE COURT IN THE REJECTION OF EVIDENCE ARE NOT REVIEWABLE IN THIS COURT.

Whether the State Court committed an error in rejecting the offered evidence of taxes paid for street improvements or improvements made upon the property, is not a federal question. Likewise whether the State Court

erred in refusing to admit as evidence the alleged plat of the town of Francesville. Likewise any error that may have been committed in the State Court in ruling upon questions of pleading or practice does not raise a federal question.

In *Mackay* v. *Dillon*, 4 Howard 421-447, it is stated by this court:

"The powers of the Supreme Court are limited in cases coming up from the state courts under the twenty-fifth section of Judiciary act to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United Statets, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant can not raise a question involving either the validity or construction of an act of congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact."

In this appeal the writ of error is without merit. If the motion to dismiss should be overruled, we ask that the judgment of the State Court be affirmed upon the merits.

Respectfully submitted,

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